INDEX.

NOTE.—The "Supp. to Brief," quoted within, is the pamphlet entitled "Legislative Enactments and Judicial Opinions."

	PAGE
The Complaint	1
The Answer	3
"The Title"	8
"The Structure"	9
"The Acts of 1892 and 1901"	11
The Federal Questions	16
FIRST POINT.—The Act of 1892 is not repugnant to the Constitution	17
SECOND POINT.—A change of judicial decision is not the passage of a law impairing the obligation of a contract, within the meaning of those words as used in the Constitution	20
THIRD POINT.—The question of the construction of the contract is, therefore, not in the case.	22
FOURTH POINT.—Upon the construction of the Acts of 1892 and 1901, read together with the Railroad Law and the Code, the decision of the Court of Appeals of New York is conclusive and will be followed by the Court	23
FIFTH POINT.—The person who did the damage and got the benefit in this case was New York—the State	24
SIXTH POINT.—Observations on the Brief for Plaintiff in Error	35
SEVENTH POINT.—The judgment is so obviously maintainable upon the independent ground adjudged by the State Court, not involving a federal question, that the writ of error should be dismissed or the judgment affirmed	38
Opinion of the Court—Muhlker Case Appendix	1
Dissenting Opinion— " " "	1

Supreme Court of the United States.

ALICE I. BIRRELL,
Plaintiff-in-Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY

and

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendants-in-Error.

October Term, 1904. No. 202.

BRIEF FOR DEFENDANTS-IN-ERROR.

Statement of Facts.

This is a proceeding by writ of error to the Supreme Court of the State of New York, allowed by his Honor, Chief Judge Alton B. Parker (page 73), to review a final judgment of and rendered and entered by that court at a Special Term thereof, dated March 31, 1903 (page 66), upon and in conformity with the remittitur of the Court of Appeals (page 1), dismissing the complaint of the plaintiff upon the merits.

THE COMPLAINT.

The action was commenced January 27, 1897 (page 2) and plaintiff Birrell in and by her complaint therein (page 3) alleged ownership since September 14, 1893, of

therein described premises, situate at the northeasterly corner of Park Avenue and 123d Street, having a width of 35 feet on the street and a depth of 100 feet 11 inches upon the avenue; that the avenue is, and has been, since prior to 1870, a public street established by proceedings under Chapter 86 of the Laws of 1813 and amending acts; that she, as appurtenant to her said premises, has rights and easements therein; that defendant Harlem Company is the owner, and Central Company is, and since April, 1873, has been the lessee of the described railroad and railroad structures which were operated by steam by the Harlem Company prior to 1873, and by the Central Company since that time; that subsequent to said lease defendants, without right or authority as against plaintiff or her predecessors in title, excavated in Park Avenue in front of said premises, and constructed in the cut or depression thus formed, with masonry walls extending above the surface of the avenue, the railroad which they have maintained and operated by steam engines for more than six years last past; that on or about April, 1893, defendants commenced, and have since continued, the construction of a permanent elevated railway structure supported by columns of iron and steel standing on pedestals of masonry imbedded in the soil of said avenue; that this structure substantially and materially interferes with and impairs the easements of light, air and access appurtenant to said premises; that the maintenance and use of this structure constitutes a trespass upon plaintiff's said easements, which will be constant and continuous; that the said acts of defendants have been, are and will be without warrant of law, without her consent, and that to prevent multiplicity of suits she invokes the equitable interference of the Court, and prays damages for the trespasses committed and an injunction restraining the further maintenance and operation of the elevated road in front of her premises.

The Answer.

The answers of the defendant railroad companies (page 6), *inter alia*, denied that they had built, or were building, or intended to add to or complete the elevated railroad structure; admitted ownership and lease of and previous maintenance and operation of the railroad and the purpose and intent to operate it on the elevated structure upon its completion; and further alleged:

That pursuant to the act of 1807, a map or plan of public streets was filed April 1, 1811, exhibiting Fourth avenue of the width of one hundred feet. That by the act of 1831 the N. Y. & Harlem R.R. Co. was incorporated to construct a railroad within the bounds and between the termini named, and in pursuance thereof located its road and made and duly filed a survey and map thereof, which, by resolution of October 22, 1831, was duly approved by the proper city authorities, which road, as located, occupied a twenty-four foot strip of land having its center line coincident with the center line of Fourth avenue, as exhibited on said city map.

That by ordinance of December, 1831, the city council granted permission for the building of the road upon conditions w hich were agreed to by and between the city and the railroad company of date January 9, 1832. That thereafter the railroad company acquired title to the said twenty-four foot strip of land extending from Harlem river to Forty-second street, including that in front of plaintiff's described premises, with the power of sloping embankments or excavations the full width of the avenue, and many years prior to the city's acquirement of title to avenue the railroad company had its road constructed and in operation upon the said strip of land and so continued until the changes required by the acts of 1867 and 1872, respectively, were successively made. That by reason of the existence of the railroad, and in pursuance of the

memorial of the Mayor, etc., the act of 1837 was passed altering the city map by adding twenty feet upon either side of this avenue.

That the railroad company's acquirement of its said title and building of its road was many years prior to plaintiff's acquirement of title, if she has any, to the premises described, all in pursuance of said act of incorporation and with the acquiescence of plaintiff's predecessors in title. That in pursuance of the act of 1848 the New York and New Haven (now New York, New Haven and Hartford) Railroad Company in that year acquired *from the Harlem Company* the right to run its trains over this portion of said railroad, which it has ever since done and is now doing. That by proceedings instituted in 1850 under and in pursuance of and subject to all of the acts, ordinances and agreements relating to the said Fourth avenue, and to the said railroad therein and resulting in an order of confirmation entered in October, 1853, the city of New York assumed to acquire title to the land within the lines of said avenue, from Thirty-eighth street to the Harlem river, subject, nevertheless, to the right of the Harlem Company, its successors and assigns, to maintain and operate its said railroad therein conformable to lawful public regulation. That by the act of 1872, as and by way of eliminating grade crossings and otherwise improving the avenue, a prescribed statutory grade of the railroad from Forty-fifth street to the Harlem river was provided and established, and provision made for viaducts and over and under crossings, all whereof was carried out and maintained and used thenceforth, and still is. That in April, 1873, the railroad was leased to the Central Company, which entered thereunder, and is now in sole possession thereof. That on April 19, 1892, the Legislature passed an Act entitled "An Act to regulate, improve and enlarge Park Avenue above 106th Street," etc., known as Chapter 339 of the Laws of 1892,

and which act has been duly amended by Chapter 548 of the Laws of 1894, Chapter 594 of the Laws of 1896, and Chapter 613 of the Laws of 1898.

That under and pursuant to section 13 of the Act of 1892 the board therein designated was appointed and organized and thereupon took entire charge of and proceeded in the execution of the work prescribed by said act, and in that behalf made sundry contracts whereunder all requisite structures, both permanent and temporary, have been and are being constructed under the sole supervision of said board and in part at the expense of the city of New York and thereby the provisions of the said act have been carried out and executed.

That all the said changes that have been made were necessary to carry out the provisions of the said acts and necessary to carry into effect the therein prescribed enlargement and improvement of the avenue.

Also pleaded the statutes of limitations and *adverse possession* for a period of more than twenty years (pp. 6-13).

The Trial.

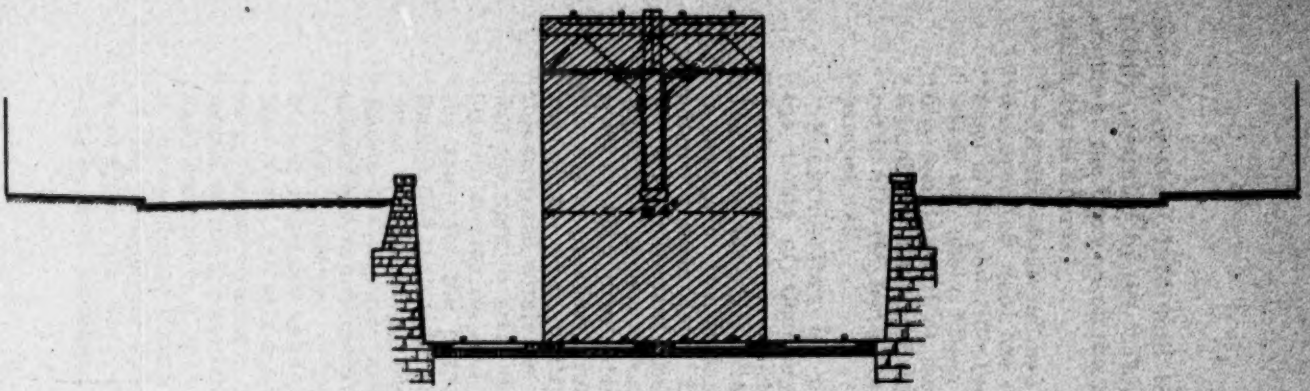
Upon the trial of the issues thus joined plaintiff gave evidence (pages 21–39), tending to prove her title to the described premises, and the measure of damages to the usable and fee value thereof claimed by her to be ascribable to the maintenance and use of the railroad structure and train operation; and defendants gave evidence (pages 41–49), tending to prove the public and private consents, agreements, grants, condemnation proceedings and users as alleged in their said answer, under all of which they claimed the right as against plaintiff to possess and use the previously and then existing railroad structures and to maintain their train operations thereon.

The proofs as to the title of the parties respectively and of the character of railroad structure maintained and used

from in or about 1872 until 1897 are, in the main, sufficiently presented by the "Third" and "Fourth" paragraphs of the decision of the trial court (pages 15, 16), which are as follows:

"THIRD.—Said railroad prior to August, 1894, "was operated along the centre of said avenue, in "front of the plaintiff's premises, in a depressed cut, "which was about fifteen feet in depth and about "fifty feet in width at the bottom, with a slope of "retaining walls, which increased the width of the "cut to fifty-two feet at the top, surmounted with a "parapet wall.

"FOURTH.—That by proceedings duly had in "the Court of Chancery of the State of New "York, entitled, In the Matter of the Petition of "The New York and Harlem Railroad Company, "in relation to certain lands, &c., and by a decree "entered therein dated December 28th, 1832, the "the said defendant The New York and Harlem "Railroad Company, became the owner in fee of a "strip of land twenty-four feet wide in front of "plaintiff's premises, running north and south "through the centre of Park Avenue, and that upon "this strip and within its boundaries the defendant "had the right to erect the viaduct structure as at "present erected on said Park Avenue, and to use "the same for the purpose of a railroad, and I "further find that under and by virtue of the char-"ter of the defendant, The New York and Harlem "Railroad Company, and the acts amendatory "thereof and supplemental thereto, the various reso-"lutions, consents, ordinances and acts of the "Mayor, Aldermen and Commonalty of the City of "New York, the said decree of the Court of Chan-"cery, the proceedings in the Supreme Court in the "matter of the application of the Mayor, Aldermen "and Commonalty of the City of New York relative "to the opening of Fourth Avenue; the various acts "of the Legislature upon which said proceedings "were taken; also Chapter 702 of the Laws of 1872, "and the acts performed by the defendants there-



SECTION OF PARK AVENUE
Across north line of 123rd. Street,
showing extent of defendant's rights,
as found by the Trial Court.
(see fourth finding, page 16 of record.)

"under, the lease of the New York and Harlem "Railroad Company to the New York Central and "Hudson River Railroad Company, dated April 1st, "1873, and all acts of acceptance, user and occupa- "tion on the part of the defendant railroad com- "panies, and the lapse of time and the acquiescence "of the plaintiff or her predecessors in title, the said "defendant railroad companies acquired the right "without liability to the plaintiff to have, maintain "and use their railroad and railroad structures over "the remainder of said bed or roadway of fifty feet "or thereabouts, as the same were maintained and "used prior to August, 1894, as hereinbefore de- "scribed."

[See opposite page.]

The judgment directed and entered (page 18) was, that the plaintiff recover the sum of $3,360 damages, and the interest thereon and costs, amounting in the aggregate to $4.483.85, and "that the defendants above named be and they hereby are enjoined and restrained from the further maintenance and operation of said viaduct structure and railroad in front of the plaintiff's premises north-east corner of Park Avenue and 123d Street outside of the 24-foot strip in the center of said avenue" etc., unless they pay to plaintiff $7,050 for a grant or release of the easements appropriated.

The plaintiff did not except to the above decision nor appeal from the judgment, and hence in so far as the findings of the trial court are adverse to her contention, they are binding upon her.

The defendants appealed and upon the review of the judgment in the Supreme Court, Appellate Division, the judgment was in all things affirmed, but by a divided court (page 63), and from this the defendants appealed to the Court of Appeals, with the result that the latter court ordered and adjudged reversal of the judgment and dismissal of the plaintiff's complaint on the merits and re-

mitted the case to the Supreme Court, wherein judgment was entered accordingly on the said *remittitur*.

[See opposite page.]

The matters relied upon for the proceeding in this court appear in and by the *remittitur* as aforesaid issued by the Court of Appeals to the Supreme Court (page 1), to wit:

"That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to Section 1 of Article 14 and the amendments thereto, and of Section 10 of Article 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

The Title.

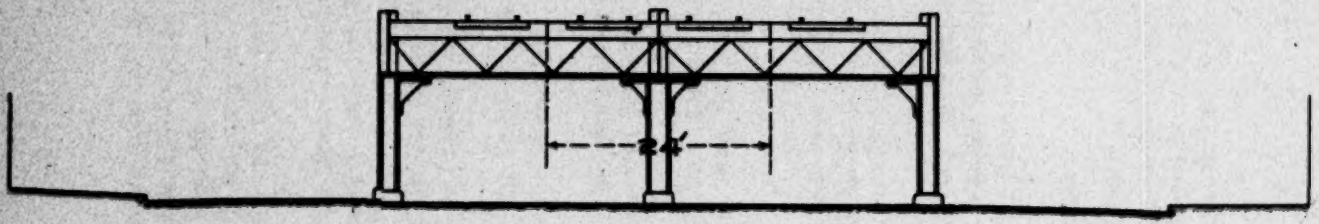
This case differs from the *Muhlker* case in the following particulars:

On the sixteenth of June, 1893, one Moore acquired title to the premises in question, and on the thirteenth of September, 1893, he deeded the premises to the plaintiff in error.

It does not appear that any conveyance of the premises had been made between 1881 and 16th June, 1893.

The law which is to be read into the plaintiff in error's contract, therefore, is the law as it stood on the 16th of June, 1893.

This was, of course, long after the decisions in the *Story* and *Lahr* cases, but it *was* also after the decisions



SECTION OF PARK AVENUE
Across the north line of 123 rd. Street,
showing extent of defendant's rights,
as found by the Court of Appeals.
(see fourth finding page 16 of record.)

of *all* of the following cases which are to be read into the plaintiff in error's contract. The list is as follows:

People *v.* Kerr, June, 1868, 27 N. Y., 188.

Story *v.* N. Y. El. R.R. Co. Argued June 7, 1882; decided October 17, 1882, 90 N. Y., 122, 124.

Lahr *v.* Met. El. R.R. Co. Argued October 27, 1886; decided February 1, 1887, 104 N. Y., 268, 270.

Fobes *v.* R. W. & O. R.R. Co. Argued April 16, 1890; decided June 10, 1890, 121 N. Y., 505, 506.

A. B. N. Co. *v.* N. Y. El. R.R. Co. Argued October 14, 1891; decided December 1, 1892, 129 N. Y., 252, 255.

Bohm *v.* Met. El. R.R. Co. Argued December 8, 1891; decided January 20, 1892, 129 N. Y., 576.

Bischoff *v.* N. Y. El. R. Co. Argued April 5, 1893; decided May 5, 1893, 138 N. Y., 257, 258.

And also—

1892, April 19—the Act of 1892 had been passed—and had the construction under it, [illegible],

1893—April (R., 5).

Actually begun—

So that both Moore and the plaintiff in error bought *with full knowledge of what was to be the physical condition of things*—whatever that may amount to.

THE STRUCTURE.

The changes there made were these—

The old structure had been a depression, or cut, about fifteen feet deep—the width of the whole being about 52 feet. The *change* was to fill up the cut, restore the whole

street to its grade, and build an elevated structure about ~~50 feet in width, of less width than the whole of the old construction but~~ some 21 [redacted] feet above the surface. This, of course, *restored the whole of the street for the purposes of access and use*, except what small parts were occupied by the supporting columns.

The Harlem Company owned the fee of the centre 24 feet—and, as the trial court found, had the right, upon that 24 feet, to build or maintain a structure as high as the present one—which is, of course, equivalent to holding that it could build one of that width still higher—and solid.

The trial court also found that the new "permanent "street use and the operation of trains thereon *outside of* "*the twenty-four foot strip*, were a continuous trespass "upon plaintiff's easements *of light and air* appurtenant "to said premises." The recovery thus being, as it has been in all the other cases, restricted to the lessening of the value of the premises by reason of the obstruction *of light and air only*—not anything for its lessening in value by reason of noise or cinders or vibration—or any of the other inconveniences *which would come from the running of the railroad*—but restricted to the want of *light and air* which would be caused solely by the *structure* (R., 25–26).

The plaintiff in error did *not* appeal from the judgment —and thus all of these holdings are binding upon her.

The Acts of 1892 and 1901.

On the 19th of April, 1892, the Harlem Company was in full life and being, and of the age of something more than sixty years. The New York Central and Hudson River Railroad Company was also in full life and being, and of the age of something more than twenty years. During all their lives it had been *one of the conditions of existence* for both of them that when, for any necessary purpose, they took any "real property" belonging to anyone, they must pay for it—and pay for it *before the taking*. By the 19th April, 1892, these provisions had become embodied in the Railroad Law of the State (Chap. 565, Laws 1890), and the Code of Civil Procedure of the State (Chap. 448, Laws 1876). As then existing these provisions were, and still are, as follows:—

Railroad Law of New York.

"ACQUISITION OF TITLE TO REAL PROPERTY.

"§ 7. All real property, *required by any railroad corporation for the purpose of its incorporation*, shall be deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real property, or *of any* right, interest or *easement therein*, required for such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, *it shall have the right to acquire title thereto by condemnation*. It shall also have such right in the following cases:

"1. Where title to real property has been acquired, or attempted to be acquired, and has been found to be invalid or defective.

"2. Where its railroad shall be lawfully in possession of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of running or operating such railroad.

"3. Where it shall require *any further rights to lands or the use of lands* for switches, turnouts or for filling

" any structures of its road, or for constructing, widen-
" ing or completing any of its embankments or roadbeds,
" by means of which greater safety or permanency may
" be secured, and such lands shall be contiguous to such
" railroad and reasonably accessible to the place where
" the same are to be used for such purpose or purposes.

" 4. Where it shall require any further right to lands
" or to the use of lands for the flow of water occasioned
" by railroad embankments or structures now in use, or
" hereafter rendered necessary, *or for any other purpose*
" *necessary for the operation of such railroad*, or for
" any right to take and convey water from any spring,
" pond, creek or river to such railroad, for the uses and
" purposes thereof, together with the right to build or
" lay aqueducts or pipes for the purpose of conveying
" such water, and to take up, relay and repair the same,
" or for any right of way required for carrying away or
" diverting any water, stream or floods from such rail-
" road for the purpose of protecting its road *or for the*
" *purpose of preventing any embankment, excavation or*
" *structure of such railroad from injuring the property*
" *of any person who may be rendered liable to injury*
" *thereby.*

" Waters commonly used for domestic, agricultural or
" manufacturing purposes shall not be taken by condem-
" nation to such an extent as to injuriously interfere with
" such use in future. No railroad corporation shall have
" the right to acquire by condemnation any right or ease-
" ment in or to any real property owned or occupied by
" any other railroad corporation, except the right to
" intersect or cross the tracks and lands owned or held
" for right of way by such other corporation, without
" appropriating or affecting any lands owned or held for
" depots or gravel-beds."

Code of Civil Procedure.

" Sec. 3359. WHEN PROCEEDINGS PRESCRIBED IN THIS TITLE TO BE TAKEN.

" Whenever any person is authorized to acquire title to
" real property, for a public use *by condemnation*, the pro-
" ceeding for that purpose shall be taken in the manner
" prescribed in this title."

By sections 3360 to 3374 inclusive "the manner prescribed in this title" is detailed, and is a regular action in the Supreme Court—the only court of *general* jurisdiction in New York, and ending in a judgment.

By Sec. 3375 possession of the property taken can only be had after payment of the compensation awarded by the judgment.

Always as long as those two corporations had lived the *lines* of their railroads had been prescribed *by law* and from time to time changed by *law*. As originally made, those lines must, of course, have passed entirely upon the lands of *other people*—lands not their own—but which they were bound as one of the conditions of their existence to *take* and *pay for*—*pay* for *before* the taking and at the end of a *regular* proceeding—in a *regular* court of *full* jurisdiction into which the owner of the thing taken was regularly brought.

In this condition of things the Act of 1892 was passed. This act, so far as those two companies were concerned, *changed* a portion of their line and required them to run upon a new line—*partly, at any rate, then the property of others.*

By it the State built an elevated structure, which it paid for itself, getting the money for it by its power of taxation, one half from the defendants and the other half from the city of New York; and it commanded and compelled the defendants to put their railroad upon it and run it there, instead of where it had been before. That this was not in the interest of the defendants, but solely in the interest of the public, was held by the Court of Appeals, and is shown by this, that the command of the Congress to have the bridge over the Harlem River raised, required the change of the former line from 129th Street to the north, *but no other change.* What the act did, however, was to give a much worse railroad line than before. The railroad was required to ascend from 106th Street to

116th Street (one-half mile) at the rate of 40 feet to the mile, and then to *descend* from 116th Street to 129th Street (rather more than a one-half mile), at the rate of 29.6 feet per mile. In other words, the net result to the railroad companies was that they had to pay something like a million of dollars *for the privilege of climbing over a bad hill.* (Section 1, Act 1892; Supp. to Brief, 16.)

The State built the structure and, as has already been said, by its power of taxation it collected the money which the building of it cost, one-half from the railroad companies and the other half from the city of New York.

The railroad companies, as they were commanded by that act to do, put their railroad upon the top of it, and have been running it there since. If they had not obeyed the command, they could not only not have got to their station in the city of New York, but their lives could have been ended.

Certain suits were then brought against them, this one among others; were determined in the Supreme Court of New York in favor of the respective plaintiffs, and went to the court of appeals.

On the eleventh of May, 1901, New York, by her legislature, passed an act which is chapter 729 of her laws of that year, and which will now be copied.

At that time there were before the court of appeals of New York cases, like this one—the *Welde* and *Fries* cases. In the following October those cases were decided against *Welde* and *Fries*, reversing the judgments below, and dismissing the action. (Supp. to Brief, 92, 97.)

We now give the act of 1901.

ACT OF 1901.

CHAP. 729.

"AN ACT conferring jurisdiction upon the court of claims
" to hear, audit, and determine the alleged claims of
" certain owners of real property in New York city
" for damages alleged to have been caused to said
" property by the operations carried out pursuant to
" chapter three hundred and thirty-nine of the laws
" of eighteen hundred and ninety-two.

Became a law, May 11, 1901, with the approval of the Governor. Passed, three-fifths being present.

"The People of the State of New York, represented in " Senate and Assembly, do enact as follows:

"SECTION 1. Jurisdiction is hereby conferred upon the " court of claims to hear, audit, and determine the alleged " *claims* of persons who now own or heretofore have owned " *real property abutting on Park avenue*, in the Borough " of Manhattan, city of New York, between One Hundred " and Sixth street and the Harlem river, or the heirs, ex- " ecutors, administrators, or assigns of said persons, *for* " *damages* alleged to have been *caused to said property by* " *the acts and operations performed and carried out*, pur- " suant to chapter three hundred and thirty-nine of the " laws of eighteen hundred and ninety-two, and the acts " amendatory thereof and supplemental thereto, *in so far* " *as said acts and operations were performed or carried* " *out by, or under the direction or superintendence of, the* "*public board created by said act*, namely, the board for " the Park avenue improvement above One Hundred and " Sixth street, and the court of claims is authorized to " make awards and to render judgments therefor against " the state and in favor of said claimants; provided, how- " ever, that this act shall not be construed as conferring " upon the court of claims jurisdiction to award *any dam-* " *ages for which any railroad corporation or corpora-* " *tions may, either at law or in equity, be liable.*

"SECTION 2. No award shall be made or judgment ren- " dered herein against the state unless the facts proved " shall make out a case against the state, which would

"create a liability were the same established in evidence "in a court of law or equity against an individual or cor- "poration; and in case such liability shall be satisfactorily "established, then the court of claims shall award to the "claimants such sums as shall be just and equitable, and "shall render judgments for the same, notwithstanding "the lapse of time since the accruing of damages, pro- "vided the said claims are filed with the court of claims "within one year after the passage of this act.

"SECTION 3. This act shall take effect immediately."

In the following year the *Muhlker* case was decided, and the court of appeals of New York speaking by its Chief Judge, then said (Supp. to Brief, 102): "Undoubt- "edly the state had also the power to provide in the act "for compensation to abutting owners, and to apportion "the expense incurred in the acquisition of the easements "destroyed upon the defendants and the city of New "York, as it apportioned the expenses of building the "viaduct and making the other changes in the street; "and it still has the power to authorize ascertainment of "the damages to the abutting owners through its Court of "Claims and to provide for their payment, *and it may* "*well be that it would be equitable for it to do so.*"

It is to be observed that under those acts the court of appeals of New York held the defendants liable for all obstructions to light and air by the building of *stations* (*Dolan* case, Supp. to Brief, 122).

THE FEDERAL QUESTIONS.

The plaintiff in error contended in the court of appeals of New York that the act of 1892 "*and the authority* "*exercised thereunder*" were repugnant to the Constitution (R. 1.)

FIRST POINT.

The Act of 1892 is not repugnant to the Constitution.

It is to be observed that the Court, in its opinion in the *Muhlker* case, has not *said* that the act of 1892 was repugnant to the Constitution. The opinion does not discuss that matter at all.

In the court of appeals of New York both dissenting judges agreed that the act was constitutional (Supp. to Brief, 109, 116), Judge Cullen saying: "The statute " would simply be inoperative until the company acquired " the necessary land."

I.

The act does not *forbid* compensation nor the giving of notice to the plaintiff.

It does not repeal the Railroad Law. If it did, the effect would be only to revive the old charters of the two companies, which contain the same commands for compensation and notice, with a statement that the act does *not* provide for compensation, *and* does *not* provide for notice—the appropriate answer to both of which statements is to *deny the fact*, and then they devote about 50 pages of print each to showing that plaintiffs have an easement.

Plaintiff's brief Court

Read together with the Railroad Law and the Code of Civil Procedure of New York it not only provides for, but *compels* compensation for the taking of any "easement," and ample notice for the fixing of that compensation.

Read in connection with the law of 1901 it gives payment, *from the treasury of the state*, for all *damages* caused to abutting property by the "acts and operations" of the board created by that act.

The word damages, as the Court has held in *Chicago* v. *Taylor* (125 U. S., 161), and several times since, means the

lessening of the value of the abutting property, which is much more than the plaintiff in error gets by the judgment below, *because* he gets only the lessening of value caused by the loss of *light* and *air*, in other words, *nothing for the running of the trains.*

We challenge counsel to put together ANY *words* which will better give compensation or better give notice.

The act of 1892 was, we submit, certainly not repugnant to *any* part of the Constitution.

And counsel seem to apprehend that condition of things, for ~~they~~, in their brief, they rely, not so much upon the *act* being repugnant to the Constitution, but upon the authority "exercised thereunder" being repugnant to the Constitution.

The phrase of the Constitution is this: No state shall "*pass* any *law* * * * impairing the obligation of con-
"tracts."

It is plain that the act of 1892, read in connection with the railroad law; the code of civil procedure and the act of 1901, does *not* impair the "obligation" of any "contract," and, of course, no "authority exercised thereunder" can do so.

That is not the question, although that is the only question which they can raise, *since that is the only question which they raised below.*

The question, as we understand it, is this:

There is a dispute between two beings—human or artificial, it does not matter—about the ownership of a piece of land, or a trespass upon a piece of land. The common law, of course, requires the being in possession of the piece of land to give it up to the true *owner*, and the being who committed the trespass to pay for it to the *owner;* but of course the person who *claims* to be owner, must show that he *is* the *owner*. And thus arises a controversy as to the ownership of the land; but that controversy can never, we submit, come to the Court.

Suppose, now, that a state makes a statute simply declaratory of the common law in this respect. That statute is certainly *not* repugnant to the Constitution. *But does it bring every dispute as to ownership of land to the Court?* Is every railroad act, general and special, repugnant to the Constitution, because there may be a dispute between the railroad company and someone else as to which of them owns a piece of land? Such disputes are common enough. Of course this is a holding either that the Railroad Law of New York *and about every railroad charter in the country is repugnant to the Constitution and void.*

In that event, of course, the plaintiff cannot recover anything but damages for the trespass. The act being void, the railroad companies cannot use the right of eminent domain to take the easements and land necessary for the structure, and consequently the plaintiff cannot recover for their permanent appropriation.

What the Court has just held in the *Muhlker* case is, as we respectfully submit, *not* that the act of 1892 was repugnant to the Constitution, but that the *decision of the court of appeals of New York was repugnant to the constitution.*

Of course there is not any such question here, since no such question was raised below.

SECOND POINT.

A change of judicial decision is not the passage of a law impairing the obligation of a a contract, within the meaning of those words as used in the Constitution.

In Yazoo and Mississippi Railroad Company *v.* Adams, 180 U. S., 41, the Court, speaking by Mr. Justice Brown, said:

(p. 44.) "There is no doubt of the general proposition "that, where a contract is alleged to have been impaired "by subsequent legislation, this court will put its own "construction upon the contract, though it may differ "from that of the Supreme Court of the state. The authori- "ties upon this point are very numerous, but they all "belong to a class of cases in which it was averred that, "properly construed, the contract was impaired by sub- "sequent legislation; but, if the sole question be whether "the Supreme Court has properly interpreted the con- "tract, *and there be no question of subsequent legislative* "*impairment*, there is no Federal question to be answered. "*Lehigh Water Co.* v. *Easton*, 121 U. S., 388.

"To sustain our jurisdiction under the second clause of "Rev. Stat., sec. 709, relied upon here, there must be "drawn in question the validity of a state statute upon "the ground of its being repugnant to the Constitution "or laws of the United States; but of what state statute "is the validity attacked in this case? None is pointed "out in the record; none set up in the pleas; none men- "tioned in the opinion of the court."

And at page 46: "Three recent cases in this court are "pertinent in this connection. In *Central Land Co.* vs. "*Laidley*, 159 U. S., 103, an action of ejectment was "brought by Laidley against the land company in a court "of West Virginia. The case turned upon the defective-

"ness of a wife's acknowledgment to a deed of land. The "Court of Appeals of Virginia, prior to the organization of "the State of West Virginia, had in several cases held that "acknowledgments in this form were sufficient; but the "Court of Appeals of West Virginia in this case held it to "be insufficient, and the change of the settled construction "of the statute was charged as an impairment of the con- "tract. This court held that under the contract clause of "the Constitution, not only must obligation of the con- "tract be impaired, but it must have been impaired "*by some act of the legislative power of the State, and* "*not by decisions of the judicial department only.*"

In this same case of *Central Land Company* v. *Laidley* (159 U. S., 103), the Court said (p. 110, 111):

"The same doctrine was stated by Mr. Justice Harlan, "speaking for this court, as follows: 'The state court may "erroneously determine questions arising under a contract "which constitutes the basis of the suit before it; it may "hold a contract void which, in our opinion, is valid; it may "adjudge a contract to be valid which in our opinion is "void; or its interpretation of the contract may, in our "opinion, be radically wrong; but, in neither of such cases, "would the judgment be reviewable by this court under "the clause of the Constitution protecting the obligation "of contracts against impairment by state legislation, and "under the existing statutes defining and regulating its "jurisdiction, *unless that judgment, in terms or by its* "*necessary operation, gives effect to some provision of the* "*state constitution, or some legislative enactment of the* "*State* which is claimed by the unsuccessful party to im- "pair the obligation of the particular contract in ques- "tion.' *Lehigh Water Co. v. Easton*, 121 U. S., 388, 392.

"Many other decisions of this court to the same effect "are cited in that case. See also *New Orleans Waterworks* "*v. Louisiana Sugar Co.*, 125 U.S., 18, 30; *St. Paul &c.*,

"*Railway v. Todd County*, 142 U. S., 282; *Brown v.* " *Smart*, 145 U. S., 452; *Wood v. Brady*, 150 U. S., 18."

And in the same case, is also said:

Page 110:

" It was said by Mr. Justice Miller, in delivering a " later judgment of this court: ' We are not authorized " ' by the Judiciary Act to review the judgments of the " ' state courts because their judgments refuse to give " ' effect to valid contracts, or because those judgments, " ' in their effect, impair the obligation of contracts. If " ' we did, every case decided in a state court could be " ' brought here, where the party setting up a con- " ' tract alleged that the court had taken a different view " ' of its obligation to that which he held.'" *Knox* v. *Exchange Bank*, 12 Wall., 379, 383.

THIRD POINT.

The question of the construction of the contract is, therefore, not in the case.

The Court takes jurisdiction of the matter of the construction of the contract, solely to determine whether the statute in question "impairs its obligation" (*Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443). But here is a case where it does not make any difference *which way the contract is construed*, because the statute is not repugnant to the Constitution *in either event*. If the construction is in the *favor* of the plaintiff in error *the statute pays him*. If it be against him, of course he is also paid for whatever he has.

We submit that until the statute is held to be repugnant to the Constitution, there is no question as to what the contract means.

In this case, as we submit, the result is as follows:

The Court takes jurisdiction because of the claim that the Act of 1892 is repugnant to the Constitution. The Court *admits*, in its opinion, by not asserting the contrary and by *not* at all discussing the question *that the Act of 1892 is* NOT *repugnant to the Constitution.*

Nevertheless, it reverses the judgment, upon a question of which, if the Act of 1892 be constitutional, it has no jurisdiction.

See the consequences. Anybody who wants to make a claim against any railroad company simply alleges that the *Railroad Law* is repugnant to the constitution—and upon that allegation brings the case here to the Court. Of course, the Court immediately determines that the Railroad Law is not repugnant to the constitution. Nevertheless it decides the case and reverses the judgment, upon the matter of the simple claim for money.

FOURTH POINT.

Upon the construction of the Acts of 1892 and 1901, read together with the Railroad Law and the Code, the decision of the Court of Appeals of New York is conclusive and will be followed by the Court.

By the Act of 1901, the State is to pay, *provided* the railroad companies are *not* liable. The plaintiff gets his money in any event.

Upon that question as to *which, under New York's own statutes,* PAYS, surely the court of appeals of New York is the proper tribunal to decide.

FIFTH POINT.

The person who did the damage and got the benefit in this case was New York—the State.

Assuming the broad principle, that where any property is taken or *damaged* for a public use it ought to be paid for, we say, *first*, that it is fair that the person who pays for it should be the person who *gets the benefit*, or, at any rate, the person who *does the damage*.

We are neither the one nor the other. The courts below have so found.

It has been found by the trial court and held by the court of appeals that the state made the structure. This is the only thing which obstructs the light and air, and it is only for light and air that the plaintiff in error recovered.

For this, by the act of 1901, New York pays from her own treasury.

> The Court has said in its opinion, that the State by building the structure and then making the railroad companies pay for it, does only by *two* acts what it could have done by *one*, but this can hardly mean that one who is *taxed* and *pays* the tax, is liable for any damages caused by the use of that money by the sovereign to which the money was paid. They—the railroad companies—were compelled to pay but half of the tax—are they then liable for one half of the damage to the plaintiff in error or have they a remedy over against the city of New York for the other half?

Under the opinion of the Court in the *Muhlker* case all the decisions of the court of appeals of New York down to the time of Moore's deed, go into the contract.

These cases, as we submit, hold as follows:—

The legislature, where the fee of a highway is *not* owned

by the abutter, has a right to put a railroad upon it and have that railroad run, without being liable to the abutter. *People* v. *Kerr*, 27 N. Y., 188. This being so, it can put it upon the top of a structure in the street just as well as upon a surface. Even though that structure be unlawful, and take away the abutter's light and air, *the running of the railroad is lawful.* In other words, the plaintiff can recover for the structure, but not for the running of the railroad. This was, we submit, held in the *Story* case. The opinions in that case, carefully distinguishing between the structure and the running of the trains, limiting what is said by the court to the *structure* and expressly and carefully stating that the court did not intend to overrule *People* v. *Kerr*, 28 N. Y., 188, and *Kellinger* v. *Forty-second street R.R. Co.*, 50 N. Y., 206 (Story *v.* N. Y. El. R.R. Co., 90 N. Y., 122, 146, 155, 159, 160, 161, 169–170).

And it is upon this ground that no recovery is allowed for *noise* in the elevated railroad cases.

A. B. N. Co. *v.* N. Y. E. R. Co., 129 N. Y., 252, 273.

Bischoff *v.* N. Y. E. R.R. Co., 138 N. Y., 257, 263.

The People v. *Kerr*, 27 N. Y., 88, was to restrain the defendants from putting a railroad upon the Seventh avenue in New York. It was brought by the people—and abutting lot owners—and the city was also made a party and took the plaintiffs' side of the case. It was proved, and the trial court found, that the title of the city to the Seventh avenue came, as to a part of it, from condemnation proceedings taken under the act of 1813, already referred to as considered in the elevated railroad cases, and that part was held by the city "in trust, nevertheless, that the same be appropriated and kept open as "public streets forever, and in like manner as the other "public streets in said city are or ought to be."

That as to the rest of the Seventh avenue the city had title, in fee simple, by deeds which expressed the grant to be upon the "*trust that the same be left open as public "streets for the use and benefit of the inhabitants of "said city forever.*" The finding of the trial court has already been quoted—that the railroad "would be a "material interference with, and injury to the use and "enjoyment of the lots fronting" on that street "to "such an extent that the same would constitute a con- "tinuous private nuisance to the owners and occupants "thereof, but for the act of the legislature authorizing "the construction of said road," and there was evidence, not denied, that the value of property "would be depre- "ciated 20 to 25 per cent. should the railroad go into "operation" (Appeal Book, fol. 232; Court of Appeals cases, Bar. Asso. vol. 10 of 1863), and the court, speaking by Mr. Justice Emott, said:

(p. 199) "This is a trust for the benefit of the "public, not of the adjacent proprietors alone, nor "of the inhabitants or citizens of New York alone, "but of the whole people." * * * "The title "thus vested in the city of New York is as "directly under the power and control of the "legislature, *for any public* purposes, as any prop- "erty held directly by the State, or by any public "body or officer." And at page 194: "If the "legislature or municipal authorities, under their "sanction, should construct such a track in a par- "ticular street or road, and while allowing all per- "sons to use that track freely with vehicles adapted "to it, should close the road to every other kind "of travel or use, it would, nevertheless, continue "to be a highway and devoted to a public use. "It is equally so, although its use is restricted to "the vehicles of particular individuals, as for in- "stance of a class of persons licensed to transport "persons or property, or of a corporation having such "privilege or authority, provided, these vehicles are "open to the public under proper regulations, and

"may be used by any and every person without "restriction or limitation, except compensation to "the owners of the vehicle." (p. 193) "Even though" "(it) * * * should be an interference with and injury to "the use and enjoyment of the lots fronting on such "streets, to such an extent that it would be a con- "tinuous private nuisance, if it were not authorized "by law, yet the statute granting such authority is "not unconstitutional, or invalid, because it does "not require compensation for this injury to the "owners of such property." (p. 195) "We are "brought to the simple question, whether, in "constructing and using a railway track with city "cars for passengers, through or over the streets "enumerated in this complaint *the defendants will* "*actually appropriate any property* either of the "City of New York or *of the individual plaintiffs.* "*If property of the latter is taken without com-* "*pensation, even for a public use, the statute is in* "*conflict with the constitution;* and the remedy "sought by them in this action is obviously just and "appropriate to prevent a direct invasion of their "own rights." And Judge Wright says the same thing (pp. 210–212).

This case is deliberately approved in all of the elevated railroad cases, and in *Fobes* v. *R. W. & O. R. R. Co.*, 121 N. Y., 505, it was deliberately followed and applied to a steam railroad in the city of Syracuse. In that case there was a finding of fact that the railroad occupied "a portion of the plaintiff's said "easement" (light, air and access), and

And the Court of Appeals of New York, said (p. 517):

"It was not intended in the *Story* case to overrule or "change the law in regard to steam surface railroads. The "case embodied the application of what was regarded as "well established principles of law to a new combination "of facts, such facts amounting, as was determined, to "*an absolute* and *permanent obstruction* in a portion of "the public street, and in a *total* and *exclusive use of*

"*such portion* by the defendant, and such permanent ob-
"struction and total and exclusive use, it was further
"held, amounted to a taking of some portion of
"the plaintiff's easement in the street for the pur-
"pose of furnishing light, air and access to his ad-
"joining lot. This absolute and permanent obstruc-
"tion of the street, and this total and exclusive use
"of a portion thereof by the defendant were accom-
"plished by the erection of a structure for the elevated
"railroad of defendant, which structure is fully described
"in the case as reported. The structure, by the mere
"fact of its existence in the street, *permanently* and *at*
"*every moment of the day* took away from the plaintiff
"some portion of the light and air which otherwise
"would have reached him, and in a degree very appreci-
"able, interfered with, and took away from him his
"facility of access to his lot; such interference not being
"*intermittent and caused by the temporary use of the*
"*street by the passage of the vehicles of the defendant*
"*while it was operating its road through the street*,
"but caused by *the iron posts* and by the *superstruct-*
"*ure* imposed thereon and *existing for every moment of*
"*the day and night. Such a permanent, total, exclu-*
"*sive* and *absolute appropriation* of a portion of the
"street as this structure amounted to, was held to be
"*illegal* and wholly beyond any legitimate or lawful use
"of a public street. The taking of the property of the
"plaintiff in that case was held to follow upon the *per-*
"*manent* and *exclusive nature* of the appropriation by
"the defendant of the public street or of some portion
"thereof. If that appropriation had been held legal,
"any merely consequential damage to the owner of the
"adjoining lot, not having any title to the street, would
"have furnished no ground for an action against the de-
"fendant. It was just at this point that the disagree-
"ment existed between the members of this court in the

"*Story* case. The judge who wrote one of the dissenting "opinions did not think that the facts presented any "different principle from that of an ordinary steam sur- "face railroad operating its road through the streets of "a city under the authority of the legislature and of the "municipality, in a case where the adjoining lot owner "did not own the fee in the street. The character of "the structure, and all the facts incident thereto, were "regarded by him as simply resulting in an additional "burden upon the street, somewhat greater in degree it "is true than a steam surface railroad, but still it was "such a use of the street as the legislature might permit, "and the legislature having in fact granted it such "power, the use of the street was, therefore, legal, and "the defendant was not responsible for the incidental "damage resulting to one whose property was not in "fact taken within the meaning of the constitutional "provision, and the defendant did him, therefore, no "actionable injury. The other dissenting judges were of "the same opiuion.

"A majority of the court, however, saw in the "facts existing in that case what was regarded as a "*plain, palpable and permanent misappropriation* of "the street, or some portion of it, to the *exclusive use of* "*the defendant corporation*, and as resulting from it the "court held that there was a taking of property belong- "ing to the plaintiff without compensation, which no "legislature could authorize or legalize. But this "taking, *it cannot be too frequently or strongly* "*asserted, resulted from the* ABSOLUTE, EXCLUSIVE "*and* PERMANENT *character of the appropriation* "*of the street by the structure of the defendant.* "There is no hint in either of the prevailing opinions "in the *Story* case of *any intention to interfere with* "*or overrule the prior adjudications in this state* "*upon the subject now under discussion, as to the steam*

"*surface railroads.* In the *Story* case it was argued "that no real distinction in principle existed between a "steam surface and an elevated railroad resting on such "a structure as was proved in that case. This court, "however, made the distinction, and the two prevailing "opinions are largely taken up with arguments going to "show the distinction was obvious, material and impor- "tant, and was so real and tangible, in fact, as to call "for a different judgment than would have been proper "and appropriate in the case of the ordinary steam sur- "face railroad, such as the *Drake* case was." * * *

II.

IT IS NATURAL AND UNIVERSAL LAW THAT DAMAGES SHOULD BE PAID FOR BY THOSE FOR WHOSE BENEFIT THE DAMAGE WAS DONE. TO THIS PRINCIPLE OF UNIVERSAL LAW THE WORLD IS GRADUALLY WORKING UP.

In the days of the good Queen Bess, if Her Majesty wanted anything Her Majesty *took it*, and paid for it if she so pleased.

In the first Constitution of New York the power of eminent domain is not even mentioned, and it is now mentioned only for the purpose of limitation. All constitutions now contain the provision that private property shall not be taken for the public without just compensation. Some constitutions contain the provision that "private property shall not be taken *or damaged* for "public use without just compensation." The Constitution of New York does not contain the latter provision, nor did it at the time when the elevated railroad cases were passed. It so happened that the damage done by

the elevated railroads to private property was enormous, and since those roads, though for a public use, were run entirely for private profit, it was only fair and just that the damage done should be paid for by the companies—it being elemental that no public improvement should be encouraged or permitted unless it will, at least, pay for the damage which it causes.

That this was the true and sole ground for the elevated railroad cases is said by Court itself, and we now quote its text.

In *Bohm* v. *The Metropolitan Elevated Railroad Company*, 129 N. Y., 576, the Court of Appeals of New York, speaking through Judge Peckham, said (p. 587):

"The plaintiffs own no land in the street. Their own-
"ership of the land is bounded by the exterior lines of
"the street itself. Hence when, under legislative and
"municipal authority, the railroad structure was built,
"it was supposed by many there was no liability to
"abutting owners, because no land of theirs was taken,
"and any damage they sustained was indirect only, and,
"therefore, *damnum absque injuria*. When the courts
"acquired possession of the question, *and it was seen*
"*that abutting land which before the erection of the*
"*road was worth, for instance, ten thousand dollars,*
"*might be reduced to a half or a quarter of that sum*
"*in value, or even rendered practically worthless by*
"*reason of the building of the road*, IT BECAME NECES-
"SARY TO ASCERTAIN IF THERE WERE NOT SOME PRIN-
"CIPLE OF LAW WHICH COULD BE RESORTED TO IN ORDER
"TO RENDER THOSE WHO WROUGHT SUCH DAMAGE LIABLE
"FOR THEIR WORK. It has now been decided that,
"although the land itself was not taken, yet the abutting
"owner, by reason of his situation, had a kind of prop-
"erty in the public street for the purpose of giving to
"such land facilities of light, of air and of access from
"such street. These rights of obtaining for the adjacent

"lands facilities of light, etc., were called easements, "and were held to be appurtenant to the land which "fronted on the public street. These easements were "decided to be property, and protected by the Con- "stitution from being taken without just compensation. "It was held that the defendants, by the erection of their "structure and the operation of their trains, interfered "with the beneficial enjoyment of these easements by the "adjacent landowner, and in law took a portion of them. "By this mode of reasoning, the difficulty of regarding "the whole damage done to the adjacent owner as conse- "quential only (because none of his property was taken), "and, therefore, not collectible from the defendants, was "overcome. The interference with these easements be- "came a taking of them *pro tanto*, and their value was to "be paid for, and, in addition, the damage done the re- "maining and adjoining land, by reason of the taking, "was also to be paid for, and this damage was in reality "the *one* great injury which owners sustained from the "building and operation of the defendant's road. For "the purpose of permitting such a recovery, the taking "of property had to be shown."

But in this instance the defendants are NOT *the parties benefited nor did* THEY *do the damage.*

The facts as to this have been already stated, but the main facts are now re-stated.

The defendants had their tracks upon a solid structure consisting of *the solid earth*—in this place a cut—of course *lasting forever without* repair. They are now upon a bridge of iron and steel—liable to rust and disintegration—and sure to need, in the future, continual and expensive repair, which, though it be that *now* they *do not* and *have not the right* to make, it is quite possible that in the end *they may be compelled to make.*

They had a level line. They now have to climb over—both up and down—a bad hill.

The change was not for *their* benefit—but distinctly to their detriment (Court of Appeals of New York, R. 167, 165, Plaintiff's brief, p. 3), and for it they were obliged to pay a million of dollars.

The damage was done for the *benefit* of *the* PUBLIC—and *the* PUBLIC—*ought to pay for it.*

In the Court of Appeals of New York, Chief Judge Parker delivering its judgment in this case, said: (R. 170) —"Undoubtedly the State * * * "still has the "power to authorize ascertainment of the damages to the "abutting owners through its court of claims, and to pro- "vide for their payment, *and it may be well that it would "be equitable to do so.*" In 1901 the state made the law chapter 729 of the laws of that year which is printed in ~~the Appendix to~~ this brief ~~(Appendix I)~~, and by that law it gave (2 Laws 1901, 1787) jurisdiction to the court of claims to "hear, audit and determine the *alleged claims*" of persons owning "real property abutting on Park ave- "nue *for* DAMAGES *alleged to have been caused* TO SAID "PROPERTY by the acts and operations performed" by the board created by chapter 339 Laws 1892—"and to "render judgments therefor against the state and in "favor of said claimants."

This means diminution in value.

Chicago *v.* Taylor, 125 U. S., 161.

2. THE STRUCTURE HAS BEEN PAID FOR BY TAXATION, AND THE PLAINTIFF CAN BE PAID FOR BY TAXATION—OF OTHERS, OR EVEN OF HIMSELF. THIS COULD NOT BE UNDER THE RULE OF THE ELEVATED CASES.

20 Jun. '92. In Bohm *v.* M. E. R. Co. (129 N. Y., 576), the Court of Appeals of New York, speaking by Judge Peckham, said (p. 586):

"Before entering on a discussion of these matters I "think it proper to say that I should hesitate to admit

" the correctness of the claim made by defendants that " *where private property is taken by a mere business* " *corporation, as for a public use under the granted* " *power of eminent domain, the legislature could provide* " *that such property could be paid for by benefits accru-* " *ing to the landowner's adjacent property consequent* " *upon the taking.* This is the case in regard to munici- " pal corporations where land is taken for a public street, " or other public and municipal purpose, and where the " benefits arising to the adjacent lands of the owner " whose property is taken may be set off against the " value of the land taken. So in the case of property " taken by the state for canal or other public purposes, " where the owner of the land was frequently paid its " value by the benefits received to the adjacent land " not taken. The principle underlying these cases is, " however, the right of the muicipality or state to tax " the owners of the land left, in order to pay for the land " taken, on the ground that they are specially benefited " by the taking, and hence should be specially taxed for " the payment of the land. The case of *Genet* v. *City of* " *Brooklyn* (99 N. Y., 296) is no authority for a contrary " view, for I think it supports that which I have sug- " gested. *A mere trading or business corporation has* " *no power of taxation,* AND THE STATE COULD NOT DELE- " GATE SUCH POWER TO IT. If *such* company desire " another's property *it must pay a just compensation* " *for it, and that compensation would not consist* IN ITS " DOING THE OWNER SOME BENEFIT UPON HIS REMAINING " PROPERTY."

The object of this point and the above quotations is simply to try to satisfy the Court that—

1. By the elevated railroad cases the *structure* was the thing paid for and not the running of the trains—and that distinction, we submit, is also made in the Court's opinion in the *Muhlker* case—

2. The the finding in this case is the same—only damage for *the structure*.

3. That the defendants are not liable *for the structure*, but the *State* is.

4. And New York having provided for the payment out of her own treasury for the damages caused by *the* structure in case the railroad companies were *not* liable for them, and the court of appeals of New York having held that the railroad companies ARE *not* liable, the judgment is right, and should be affirmed.

SIXTH POINT.

Observations on Brief of Plaintiff in Error.

The brief on behalf of plaintiff in error is so voluminous as to forbid the attempt at response to its propositions in detail.

Its statement is that "the questions raised upon this appeal are substantially the same as arose and were decided in the Muhlker case," and that is "whether Chapter 339 of the Laws of New York of 1892 as interpreted by the Court of Appeals in that State is constitutional in so far as it authorizes the construction of the viaduct in question and the taking of the easements of abutting owners without compensation" (page 2).

Further along it is stated "it is not necessary in this case for this court to decide the question whether the act of 1892 was or was not unconstitutional. That act nowhere states that the railroad companies shall be free from the obligation of paying for the easements they have appropriated, and this is pointed out in the Fries case by the able dissenting opinion of Judge Cullen" (page 46). And this is the statement of how the Federal constitution has been offended against, to wit: "The statute provided for the erection of an elevated railroad. The Supreme Court of the State of New York held that plaintiff was entitled to compensation for the property taken in the construction of the road. The Court of Appeals held otherwise, and that because the State had commanded the erection the plaintiff was not entitled to such compensation. It is this *decision of the Court of Appeals* that we seek to have reversed. It is that *authority exercised under that act* that we seek to have overruled in this case" (page 47), and authorities are cited in support of the proposition that "the prohibition in the fourteenth amendment applies to * * * judicial authorities" (page 48).

As regards defendants' contention in and by their answer, the brief states that they "denied the street use or trust as to the portion of the street occupied by the railroad" and "set up the various statutes of limitation and a claim to title by prescription" (page 4).

NOTE.—The answers set up claim of title by adverse possession, based upon all the grants, consents, acquiescence, users, and other facts and circumstances set up in the answers, and which, being unsupportable by any mere incorporal right to pass over the land, pointed to and evidenced title sustaining the right to possess the land to the exclusion of all others.

A statement which would be unimportant if correct, but demands a passing notice because of its inaccuracy, is that "the constitutionality of the State statute, in so far as it operated to deprive the plaintiff of compensation for her easements, was assumed in the Supreme Court by the trial Judge, and by the Supreme Court, Appellate Division" (page 7).

Nobody disputed in either of those courts, nor in the Court of Appeals, the right of the plaintiff to have compensation for such, if any, easements as she was legally entitled to as against the railroad company and the public, and hence there was no occasion for any court to, and neither thereof did, hold the law unconstitutional; but, adjudging that plaintiff's easements had been trespassed upon and were taken, adjudged her compensation in obedience and conformity to the well-established law and practice pertaining to the state of facts adjudged.

Apparently for the purpose of giving life to easements antedating the building of the railroad, it is stated with reference to the map filed in 1811, under the Act of 1807, that "the New York courts have frequently decided that the filing of such a map pursuant to legislative authority involves a devotion of the lands designated on the map to the corporate uses of the municipality, or for the benefit of the corporation on whose behalf the map is filed" (page 12).

That seems a rather monstrous proposition to assert in a case calling in question the taking of property for public use without compensation. If Benson's property could be and was thus dedicated to public use by the act of the city in making a map, the proceedings of 1853 and thereto incident payment of compensation for the same land would seem to have been superfluous.

On the contrary, when the railroad entered and instituted its proceeding to condemn, Benson's right was not that of a mere easement for his abutting property in,

upon and over the 100-foot strip, but the ownership of the fee of both. By that proceeding the railroad company acquired from him the fee to the 24-foot strip, and it was so adjudged in the condemnation proceeding, and so adjudged by all of the courts in this case.

Moreover, within the time intervening between that proceeding and the proceeding for the opening of the avenue Benson conveyed to Bruce, and when the City acquired the title that it did acquire in the street opening proceeding, in that portion of the 100-foot strip outside of the 24-foot strip, it acquired it from Bruce (Plaintiff's Exhibit H, opposite page 49). Thus the street was created as a railroad street, with the right of the defendants to maintain their railroad structure within the centre 24-feet, of any height the corporate purposes might render desirable, and such is the legal effect of the decision of the trial court (Paragraphs "Fourth" and "Sixth," pages 16 and 17).

The right of the railroad was not that of the mere passage of its engines and trains upon tracks at or upon the ground surface of the street of the future avenue, but wholly without reference to either of these.

SEVENTH POINT.

The judgment is so obviously maintainable upon the independent ground adjudged by the State Court, not involving a federal question, that the writ of error should be dismissed or the judgment affirmed.

When the four-track structure was built, and during its use, the exclusive possession of the land, the law

and physical fact shutting all other persons and uses from it, constituted the assertion of such property right and title as would serve to explain and justify that character of possession. It was in every respect and particular identical with that of possession of the centre 24-foot strip to which the railroad held title in fee.

No grant, either express or implied, of the mere right to maintain and operate a surface railroad would serve to either explain or justify that character of occupancy.

The character of possession gives character to the title which that possession constitutes assertion of. When the trial court found, as it did, that the railroad company had acquired the right to thus exclusively possess and occupy, in perpetuity, the ground occupied by its two outer tracks, such finding could only be based upon and supported by a title by and to occupancy of, as distinguished by or to the mere right of passing over the land.

The line of reasoning which would lead to the conclusion that a title evidenced by or growing out of such exclusive occupancy and use of the approximately 60-foot strip of land would be inadequate to justify the occupancy and use of the same land with a higher railroad structure, would, by the same rule of logic, lead to the conclusion that one having entered under color of title in fee and possessed for the statutory period of limitation a tract of land with a one-story building thereon, could not, by the title thus acquired, and evidenced, justify a subsequent possession of the same tract of land with the maintenance of a two-story building thereon.

The Elevated Railroad Cases.

In the elevated railroad cases the defendants did not and could not set up any claim of having acquired from the abutting owner any property right in addition to that which had been reserved or acquired by the public for public street purposes. The railroad companies stood

upon the consents granted to them by the public authorities, and upon these contended that the maintenance and operation of their railroads were consistent with and, indeed, a part of the public street use reserved or acquired by the public, and hence they were not liable.

The ground upon which *Story* and subsequent complainants were adjudged entitled to recover was that this contention of the railroad companies was untenable. The field of the inquiry which led to that determination did not at all involve the question whether complainants had parted with any property right or contract right other than and in addition to that reserved or acquired by the public for public street uses, because there was no foundation for any such claim, nor was it asserted. When Story purchased his premises he found the street upon which they abutted an open street, just such as was called for by the terms of the grant under which the street was created and abutters' rights vested. In reliance upon his asserted right to have that condition continue, he alleged the threat and intent of the defendant railroad company to build its elevated road, and prayed injunction to restrain it from so doing.

Altogether different are the facts in the case at bar. When this plaintiff purchased the premises abutting upon Park Avenue described in the complaint, he found those premises abutting upon an open street or avenue of the width of 40 feet, and next to that a 60 foot strip of land occupied and used solely and exclusively for railroad maintenance and operation, and upon the opposite side of that strip of land another like open street or avenue, upon which the premises opposite to and 140 feet distant from his abutted. Upon his negotiation for the purchase of the premises described in the complaint, he was charged with notice and presumably had actual knowledge of the occupancy and use of that 60-foot strip of land. The rightfulness of that occupancy and use was open to in-

quiry, and, it is but fair to presume, was the subject of such inquiry as plaintiff saw fit to make concerning it.

In the language of Martin, *J.*, the *Conabeer* case (156 N. Y., 474), at page 493, "he purchased the premises with full knowledge of its existence, of its purpose and use, and with constructive notice of the defendant's grants. With that knowledge, presumably, she (he) made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendant's railroad, and hence lost nothing by being deprived of any of her (his) otherwise appurtenant easements."

Inquiry upon that subject at that time would have and presumably did afford him the knowledge which the evidence in this case disclosed, that the public street had never been opened upon or over or occupied the same ground as the railroad; that the street had from its inception consisted of the public highway upon either side of the railroad and not of the railroad ground. Whereas *Story* in his purchase had every reason to suppose that he was acquiring the same property right and the same measure of property right and contract right which the deed of the City under which the street was created, and under which the rights of his predecessor in title, the immediate grantee of the City, were vested; and that such was the character and measure of his property and contract right stood undisputed; in the case at bar this plaintiff at his purchase had open and notorious information that the rights of his grantor were not the equivalent of those which vested in the immediate grantee of Poillon, plaintiff's remote predecessor in title.

The question which this case presented was not at all that of the right of the State or the railroad company, or both, to maintain an elevated viaduct structure with a railroad thereon, founded merely upon the right to operate

a surface railroad in the street, such as the *Kerr* case and *Fobes* case involved.

The earth surface in and upon which those railroads existed and were operated was a part of the open public street, the same identical parcels of ground used in common by both the railroad company and the public. The passing of railroad engines, cars and trains over the tracks differed in the degree but not in the character of their interference with the general public use of the same portions of the street's surface, from that of other vehicles passing over it; and the determination and adjudication that such railroad use is not inconsistent with street use is founded upon the fact that the one use does not exclude the other.

On the other hand, the case at bar does not at all involve the question of the right of existence and operation of an elevated railroad structure upon and over a theretofore existing open public street, for the operation of a railroad thereon which had theretofore used the street, or the same portion thereof in common with the general public, but the question is as to the right of existence and use of such railroad structure over the strip of land thereunto rightfully, as against abutting owners, occupied and used by and for the railroad to the exclusion of every other occupancy and use.

Obviously the doctrine of law which sustains the right of existence and use of an elevated railroad structure over the same strip of land theretofore rightfully occupied and used exclusively for railroad purposes, constitutes no determination of the question whether a railroad such as the *Fobes* case dealt with, might be placed upon an elevated viaduct structure over the theretofore open street, without liability to abutting owners; nor does it at all involve the doctrine of the elevated railroad cases holding such structure inconsistent with the open street

to which the complainants in these cases were adjudged entitled.

This 60-foot strip of land is now a part of the public street by virtue of the act of 1892. As against this plaintiff the trial court has adjudged that it was the right of the railroad company to occupy this land to the exclusion of street uses, as it had done prior to the act of 1892, and hence that, but for that enactment, it was not the right of the plaintiff to have an open street, or any street, over that strip of land.

THE LEWIS CASE.

The contention on behalf of complainant in the *Fobes* case was that the rule of the elevated railroad cases was controlling as to the railroad and its use of which he complained.

So here the similarity of conditions presented by this structure and its use to that of the elevated railroads complained of in the Story and Lahr cases, at first blush, seemed to favor the theory that all contentions and controversies in respect thereof were within and governed by the principle of the adjudged elevated railroad law. It was with seeming difficulty that the fact that the same ground was never before used for both street and railroad purposes, constituted a factor in the solution of the question of easement rights in and over the railroad ground which by the Act of 1892 became, *in fact*, a part of the street.

The court recognized some of the distinctions between the ordinary elevated railroad case and that regarding this structure in the Lewis case, but was, nevertheless, as we respectfully submit, led into quite obvious error by the influence of the natural leading of the consideration above mentioned. The right controverted in the elevated railroad cases was that of the construction and use of the elevated railroad in a theretofore free, open street. The

character of occupancy and use of the street which the elevated railroad contemplated and effected was such as might with some measure of reason and propriety be termed a mere easement or incorporeal hereditament, the right of which as against abutting owners might be the subject of express or implied grant, and if the latter, might, with a measure of propriety at least, be characterized as a title by prescription; that is to say, it involved a unity of use of the street as an entirety by the railroad, its stations and approaches, and by its passengers as such, coincident with the use of the same street by the general traveling public in the ordinary public street uses. When, as the result of the act of 1892, the center strip of land was included in and made a part of the open traveled street or avenue, with the railroad bed above it, supported by columns resting upon masonry imbedded in the soil of the street, the conditions created were very like those existing in the elevated railroad avenues. In this very particular, however, the former railroad structure, the occupancy of the ground covered by it, and of the soil of that ground exclusively for railroad purposes, and the structure maintained in such manner as to exclude the public from the railroad ground, differed in character entirely from the occupancy and use of the avenues by the ordinary elevated railroad, and from the occupancy and use of this avenue by the now existing Park Avenue viaduct structure.

Title by prescription is not recognized upon either principle or authority as the title upon which to rest a right of sole and exclusive possession of, and the maintenance of fixed physical structures upon, a tract or strip of land. The exclusive possession and use is not the exercise of a mere easement right, or the character of evidential fact tending to show that incorporeal right; while it includes the right of passage upon and over the strip of land, it includes also very much more than that,

in that it is the physical possession of the land of the character designated in the law as "adverse possession."

When the plaintiff purchased his land abutting this avenue, then of the open width of 40 feet, upon which his premises abutted, and saw the adjoining 60 feet devoted to and used exclusively for railroad purposes, this was not merely notice of a right to operate a railroad upon the street surface, such as the *Fobes* case dealt with, but a right to possess the lands to the exclusion of every other occupancy and use. It was such notice as to put him upon inquiry concerning the right of the railroad company to do what it was there openly doing in that regard. It was a notice of adverse possession of the land, and not of a mere right to move engines, cars and trains over it. That inquiry pointed to the record of the deed to which the possession was to be imputed as explanatory of it; it led to evidence of a possession continued for upwards of 50 years, during which the ground occupied by the railroad had never been used by the public in common with the railroad. Such inquiry led to the record of the deed explanatory of that exclusive possession, and which purported to grant and release, not merely the right to build, maintain and operate a railroad upon the surface of the avenue, or upon the surface of the ground, but specifically to occupy with its embankments or excavations the full width of 100 feet. It was a present and perpetual release of all damages resulting to premises abutting the avenue, not merely by a railroad upon the earth's or avenue's surface, but elevated or depressed, as it might be, by embankment or excavation of the width of 100 feet.

It is no answer to this to say that the deed when made did not carry good title because the grantor therein had at this particular point already parted with his title. The deed constituted the color of title under which the railroad company from 1835 to 1897 maintained its contin-

uous, hostile, open and exclusive possession of so much of the property described in the deed as was requisite for its railroad structures as within that time maintained and used. The character of deed which that possession constituted notice of to plaintiff was not that of a property right which would justify maintenance of a railroad upon and over ground to be used by it and the general public, but of a deed vesting or purporting to vest the right to such exclusive possession as was there exercised.

One of the errors which intervened in the *Lewis* case, and which was corrected in the *Fries* case, was that of a proper recognition of the source and character of title, or color of title, upon which was maintained the exclusive possession by the railroad, which the trial court in each of the cases adjudged the defendants entitled to. The character of the title to which that rightful exclusive possession was ascribed in the *Lewis* case, to wit: that of title by prescription, did not embrace proper cognizance of the nature of title requisite to justify that which the court found to be justified. The court in the *Lewis* case conceived, and went upon the hypothesis, that because the railroad company had the consent of the City to the building of its road in the laid-out but then unopened avenue, therefore it could not be permitted to claim title under its deed from Benson produced in evidence, but nevertheless might be permitted to claim title under a deed supposed to be lost; and, upon that hypothesis, it was held that, as between the railroad company and the City, the railroad possession was presumably under and in subordination to the title of the City; but that as against the abutting owner it was hostile and of character to evidence the acquirement of title; but the title presumed to have been acquired, instead of that which the deed put in evidence purported to grant, was that under a deed presumably lost, and presumably carrying only such property right as was requisite for the maintenance and use of the succes-

sive railroad structures which existed prior to the present one. And right here it may aid to correct apprehension of the status of respective right between these complainants and the railroad company, to consider just what condition of affairs existed immediately prior to the building of the two-track railroad structure.

The map of the City of New York, including this avenue of the width of 100 feet, had been made and filed in 1811. The act under which it was made imposed no obligation upon the City to open the streets shown upon this map, but left it to the City to determine from time to time the question of opening, and it is a matter of common knowledge that many of them never have been opened, and it is not intended that they ever shall be. To be sure, the plaintiff's grantor Poillon had granted to the City, in trust for street purposes, this 100-foot strip of land, but the deed had not been recorded and the City had not taken any action indicating either its acceptance of the trust or its purpose to open this avenue at that point either then or at any future time. The resolution of the City Council made no reference to particular land, or land of any particular locality, other than land over which the line of the railroad from Twenty-third Street to the Harlem River had been located.

The charter of the Harlem Company obviously contemplated a railroad which should exclude the public from its ground, and, instead of proceeding upon the hypothesis of the *Kerr* and *Fobes* cases, that if the railroad were located within the bounds of a public street the public consent would constitute sufficient authority for their maintenance and use of the road, the charter, on the contrary, specifically and peremptorily compelled the railroad company to acquire the property not donated for its right of way, and for that purpose gave it the power of condemnation. The railroad company did not proceed upon the hypothesis that public consent constituted sufficient

authority for the building and maintenance of its road where it was located. On the contrary, it proceeded to acquire, by condemnation in some instances, and by deeds in others, the title of and for its right of way, in obedience to the command of its charter. Having gotten these, it proceeded to build its road, and had it in operation in or about 1835.

The character of its possession is only properly ascribable to such character of deed or muniment of title as would be adequate to authorize and warrant such character of possession. A deed purporting merely to grant the right of passage of engines, trains and cars over the surface of the ground until the street was opened, and upon the surface of the street after that, would not have been sufficient to authorize the maintenance and use of railroad structures which excluded the grantor and the public from the ground occupied by them. Any deed fairly within the contemplation of a title or grant by "prescription" would constitute no sufficient warrant for that character of possession. The railroad structure, and use of it, as plaintiff saw them prior to his purchase of the premises described in his complaint, was notice to him of the title which gave a right of possession to the exclusion of all other occupancy and uses, and which included every beneficial right and interest in the land. When this case went to the Court of Appeals, and that court found in the record the finding of the trial court as set forth in its decision, and searched the record for the nature and character of the evidence on which that finding was founded, that record showed it to be based, not upon title by prescription, or a deed supposedly lost, but upon the muniments of title proven, including the deed set forth in the evidence as constituting the color of title under which the exclusive possession had been maintained, and which the trial court had found to be rightful.

The ground upon which the trial court held the plaintiff disentitled to recover in respect of the maintenance and use of the railroad structure existing at the time of the 1892 enactment was, not that there had not been a property right or contract obligation which, if still in force, the maintenance and use of that structure would be inconsistent with; but by the muniments of title set forth "the said defendant railroad companies acquire the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894, as hereinbefore described;" in other words, that the property right or contract obligation upon which plaintiff relied had been released to and acquired by the railway companies.

This determination of the trial court was founded upon its interpretation, construction and legal view of all of the facts, circumstances, grants, express and implied, and other oral and documentary evidence before it.

The adjudication of the trial court was that the property rights which the railroad companies had acquired from the predecessors in title of plaintiff, and from plaintiff, were such as entitled them to the exclusive occupancy and use of that strip of land for railroad purposes without liability to the plaintiff.

The ground upon which the trial court concluded and determined that the existence and use of the elevated structure constituted a trespass upon plaintiff's property rights, was, not that plaintiff was entitled, as against the railroad companies, to have this strip of land opened for ordinary street uses, either relieved of the railroad or otherwise, for the court had expressly found to the contrary; but, upon the ground that the right which the railroad companies had acquired to occupy and use this 60-foot strip of land exclusively for railroad purposes was

not such as could justify the maintenance and use of an elevated railroad structure upon and over the same strip of land, which the court had determined that the railroad companies had acquired the right to occupy and use for railroad purposes to the exclusion of all other occupancy or use.

When by the appeal of defendants, first to the Supreme Court, Appellate Division, and second to the Court of Appeals, the jurisdiction of those courts was invoked to review and determine the accuracy of the judgment of the trial court in adjudging these property rights as aforesaid acquired by the railroad companies as insufficient to justify the maintenance and use of the existing railroad structure, those courts in turn were called upon to interpret, construe and adjudge the legal effect of, not at all the contract obligation under which easement rights had become vested in plaintiff, or her predecessor in title, but rather and solely the legal effect of the instruments, grants, express and implied, and other muniments of title which had been acquired from them by the railroad companies, and which the trial court had determined was sufficient to justify the maintenance and use of the 1872 railroad structure, but insufficient to justify the maintenance and use of the 1892 railroad structure.

The result of that review by the Court of Appeals was the determination that the property rights which the railroad companies had acquired from and against plaintiff and his predecessors in title, and which the trial court had found and adjudged sufficient to justify the maintenance and use of the 1872 railroad structure, were sufficient to justify the maintenance and use of the 1892 railroad structure.

In the consideration and discussion which led to the conclusion by and upon which these cases were distinguishable and distinguished from the ordinary railroad cases, the State courts had no occasion to examine with

particularity the question of similarity or of difference between the original property rights or contract rights of the parties in the one class of cases as compared with those in the other, because the controverted question presented did not relate to original conditions, but to subsequent changes or modifications thereof. In the ordinary elevated railroad cases the abutting owners had parted with nothing of either property right or contract right except that which had been granted or taken for public street uses; while in these cases it was equally undisputed that the railroad companies had acquired from the abutting owners, and the abutting owners had parted with some property rights and contract rights other than and in addition to those granted or taken for public street uses, and the question before the court was as to the extent of the rights which the railroad companies had thus acquired, and these plaintiffs and their predecessors in title had parted with. Thus, in the *Fries* case (169 N. Y., 270), O'Brien, *J.*, writing for the Court of Appeals, having in the earlier portion of his opinion stated that the parties had discussed before the court the effect of a certain deed to the railroad by the former owner of plaintiff's proerty, and other details relating to the right of the railroad construction and maintenance in the street, and that in the view of the court this discussion was unimportant, because the decision of the trial court contained the express finding that the property rights and contract rights which the railroad companies had acquired were such as entitled them to maintain and use the railroad and railroad structures as they were maintained and used to and until February, 1897, without liability to the plaintiff, and that the character of maintenance and use as thus found to have been rightful was such as totally excluded the predecessors in title of plaintiff, and plaintiff, and the public, from all access to or over or use of the strip of land theretofore and now occupied by the railroad, pro-

ceeded to discuss the right of the State as against Fries, to do what it did, in view of the rights which the railroad companies had as aforesaid acquired from Fries and his predecessors in title, and announced the conclusion that because of the rights so acquired, the act of 1892 and the authority exercised and acts done thereunder were rightful. The learned judge on pages 278–279 (160 N. Y.,) announces specifically the ground of distinction between the elevated railroad cases and the case before the court as follows:

> "The elevated railroad cases in this court proceed "upon the principle that, as against abutting owners, "the railroad was unlawfully in the street as they "had not consented to the construction or conveyed "the right to interfere with their easements. But "in the case at bar we have an express finding that "the defendant had acquired the right as against "the plaintiff to use the street for the operation of "the railroad. Hence, the principles upon which "that mass of litigation proceeded have no applica- "tion to this case, and so this court has held. "(*Conabeer v. N. Y. C. & H. R. R.R. Co.*, 156 "N. Y., 474)."

Having in mind the fundamental rule and doctrine that the right of review and to reverse upon review is dependent upon the finding that the judgment is erroneous, in that it is not sustainable upon any ground that is not violative of the Federal Constitution, in some one or more particulars complained of, and that such right of review and reversal does not at all arise upon mere erroneous statement in the opinion announced, it is obviously more specious than sound to grasp at such supposedly erroneous statements in the opinion, and which, indeed, can be deemed erroneous only by reason of considering them as having no relation to facts set forth elsewhere in the same opinion, and, upon such disjointed excerpts of the opinion, assume the province of reviewing and reversing the judgment.

Each expression in the opinion is to be regarded as but a part of the entire whole. Each statement is to be taken together with and in the light of every other statement, which together constitute the entire opinion.

The judgment of the state courts determines solely the question of the liability of the railroad companies to the plaintiff. Plaintiff's complaint was against the railroad companies. It alleged that they had constructed or were constructing and intending to complete and maintain this structure, and when complete to operate the steam railroad upon it. The proof utterly failed to show that the defendants were the builders of the structure. The proof showed, on the contrary, that the structure was built by the State. That proof was undisputed. The finding is that the structure was built as provided by the act of 1892, to wit: by a state board created for that purpose. At the time of the trial the structure stood where it was built, and stands there to-day, not by reason of anything that the defendants have done, but by reason of the character and strength of the structure which the state built. The railroad companies have no more right to remove it than the plaintiff has. The determination of the trial court was that the railroad companies were not answerable in damages for the building of that structure. To have reached any other conclusion would have been to say that the railroad companies were answerable in damages for what the State did, which the railroad companies could not prevent, and with the continuance of which the railroad companies are powerless to interfere. What is true of the building of the structure is true regarding its existence as built so far as concerns the existence of this structure, and any damages resulting from it to the plaintiff; it is not a case of a structure created or existing by the act of the defendants, either with the permission of or in obedience to the command of the state, but by the act of the

state itself, through the board created by it for that purpose. If this structure is of such unlawful character that it is the right of any one, other than the state itself, to remove it, it is as equally the right of this plaintiff as of the defendants.

Injunction against the defendants' use of the structure would not serve to remove the structure. A mandatory injunction against the defendants commanding them to remove the structure would certainly be unwarranted, for it would command the doing of a thing which they have no legal right to do; and, furthermore, as now appears, it does not at all follow that because the plaintiff is not entitled to hold the defendants answerable for a thing which they did not do, and with the consequences of which they are powerless to interfere, that therefore he is without remedy.

The Court of Appeals pointed out the proper source of plaintiff's remedy, and the state has, as above shown, by Chapter 729 of the Laws of 1901, provided that remedy against the state through its Court of Claims.

If upon any view it be the legal right of this plaintiff to have restored the conditions existing at the time of the 1892 enactment, whatever right he had in regard when this suit was instituted, he had as the foundation for objection to the work when the State by its board commenced the work of building an elevated structure opposite his premises

During the five years that that work was in progress it was open and notorious. His right to speak then was clear. Upon reason and equity it would seem that his duty to speak then was equally clear, and that he failed to speak when he should, and thereby waived his right to be heard now. He saw that work go on to its result and consummation, which he knew from the first to be the designed result and consummation. By that work thus

conducted and completed under his observation and notice the former railroad structure was destroyed and the present one supplied, not by the railroad company, but by the State. The inquiry naturally suggests itself, upon what foundation, as for what reason, should the railroad companies be at the expense of undoing what the State did, and what, if plaintiff now has any right of complaint, he had the right to speak against and prevent the consummation of. Upon what principle of law or logic should plaintiff be permitted to remain thus silent and apparently acquiescent while this great work was carried on to its consummation, and now seek to saddle upon the the railroad companies the expense of restoring that which he might have prevented deprivation of by timely intervention on his part.

THE MUHLKER CASE IN THIS COURT.

The theory of fact upon which this court has proceeded to adjudge the reversal of the judgment of the state court in the Muhlker case, is:

That the plaintiff's property right of light and air in and over the entire 140 feet width of Park Avenue was identical with the like property right of *Story* and *Lahr* in and over the streets upon which their property abutted, save and except only that plaintiff's such property right was subject unto such limitation and interference as resulted from the right of the railroad companies to maintain and operate their railroad upon the street surface, as in the *Kerr* and *Fobes* cases, or in and upon the railroad structure built and used under the act of 1872; whereas, the real fact was and is that by the deed of Poillon to the defendant Harlem Company, and the more than sixty years' continuous, hostile, open and notorious possession under the claim, as against plaintiff and his predecessors in title, of the title which the said deed purported to grant, plaintiff's said property right of light and air in

and over the said avenue was subject unto the right of the railroad companies to maintain and use their railroad at its present elevation, supported by a solid embankment with slopes occupying the width of one hundred feet. (Record, page 49.)

Upon and by reason of the foregoing misapprehension regarding the facts in the case, this court has supposed that the act of 1892, as construed and adjudged by the state court, operated to take from plaintiff his said property right of light and air vested in him subject only unto the limitations first above stated, and that the state court had adjudged this operation of the statute a lawful exercise of the power of the state, because the design and effect thereof was the enlargement and improvement of the avenue for public travel therein; whereas, the true foundation of the judgment of the state court, in holding valid the said enactment, was, that the railroad companies had acquired, from and against plaintiff and his predecessors in title, all beneficial right and interest in the sixty foot strip of land, so that plaintiff had no property right of light or air or otherwise in or over it, because he and his predecessors in title had specifically released the right to object to the existence and use of a railroad at the elevation it now exists; and, hence, that the damage or loss resulting from the change of railroad structure was not the result of any legal injury: and upon this view it was that the state court adjudged the 1892 enactment not violative of the Federal Constitution.

It is only by means of revision of the judgment of the State court upon the above-mentioned rules of local property law that a status is presented apparently violative of the Federal constitution, and it is but fair to the State Courts and to the parties hereto that the measure of this court's revision of such local property law of the State be stated with reasonable precision.

Indeed the rules of law to which these directions pertain are in no whit less solely those of local property law, than those upon which this court adopted the rule of the State courts in preference to that which it had itself twenty years previously announced.

Suydam v. *Williamson*, 24 How., 427.

We respectfully submit that the writ of error should be dismissed or the judgment should be affirmed.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In Error to the Supreme Court of the State of New York.

[April 10, 1905.]

Plaintiff sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park Avenue and One Hundred and Fifteenth Street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park Avenue, in front of said premises." The defendant, The New York

and Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park Avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 72 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

> "FOURTH.—That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is

supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"FIFTH.—That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"SIXTH.—That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"SEVENTH.—That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad

in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"EIGHTH.—That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"NINTH.—That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"TENTH.—That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants' tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further of the sum of $3,000, with interest thereon from October 10, 1900. Damages were also adjudged to plain-

tiff in the sum of $1,400, with interest from February 16, 1897, and cost. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis* vs. *New York & Hudson River Railroad* (162 N. Y., 202.)

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

Mr. Justice McKenna, after stating the case, announced the judgment of the Court and delivered the following opinion:

As we have observed, the Supreme Court followed *Lewis* v. *New York & Hudson River Railroad* (162 N. Y. 202), both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it. The court, by brief expression, pointed out the identity of the cases and disposed of the defence made by the railroad companies of adverse possession as follows:

> "The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were

those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis* vs. *New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar.' In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence,''

In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as it expressed rights of abutting property owners, to have have been improvidently decided, and the Elevated Railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the Lewis case as to the use of the structure. It was there said: "When they (the railroads) commence to use the steel viaduct, they started a new trespass upon the rights of abutting owners." There was no hesitation then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in perform-

ing the duties devolved upon it a railroad may be required to exercise the right of eminent domain (*Jacobson* v. *Wisconsin, Minn. & Pac. R. R.*, 179 U. S. 287); see also *Mayor and Aldermen of Worcester* v. *Norwich and Worcester R. R.* (109 Mass. 103). We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's prop-

erty without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial Court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be, as expressed by Bartlett, *J.*, in his dissenting opinion, "$3,000 fee damages, $1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial, that is, $4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery

to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In *Barnett* v. *Johnson* (15 N. J. Eq. 481), there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions." And, graphically describing the right, observed further, "Is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?" It has been said *Barnett* v. *Johnson* anticipated "the principle upon which compensation was at last secured in the Elevated Railroad cases in New York." (1 Lewis Eminent Domain, 183.)

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story* vs. *New York Elevated R.R. Co.* (90 N. Y., 122) and *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 268), known as the Elevated Railroad cases. The Lahr case was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the Elevated Railroad cases was the Story case, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front Streets in the City of New York, on which there were buildings.

To their enjoyment light, air and access were indispensable, and were had through Front Street. The defendant was about to construct a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front Street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid, on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation

that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of having the street forever kept open as such;" and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the

street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto," as the house which was held to be an obstruction in *Corning* vs. *Lowerre* (6 Johns. Ch., 439), or the freight depot in *Barney* vs. *Keokuk* (94 U. S., 324).

The conclusion of the Court and the distinctions made by it were repeated in *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 271). The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the Story case," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the Story case had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question prcsented. And it was declared that "it would be the occasion of great public injury if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt and theme of renewed discussion." The doctrine of the Story case was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the

city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the Constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the Story case and could not derogate from the title a property it conveyed, and it was contended that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

Equally untenable are the grounds of distinction urged

in the case at bar against the application of those principles. What are they? In the Story and Lahr cases the railroads were imposed for the first time on the street. In the case at bar the Harlem railroad had occupied the surface of the street, and was changed to the viaduct. But in the Story and Lahr cases it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the Story case, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the Story case, and that case was distinguished thereby from the Surface Railway cases. And in the Lewis case a difference was recognized between the two situations and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defence was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corpo-

ration the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would — and probably would not if it could —deprive defendant of its rights to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "by the command of the statute, and hence under compulsion of law," to quote from the Court of Appeals. The public interest therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument; it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the Story case that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes* v. *R. W. & O. R. Co.* (121 N. Y. 505), where a steam railroad was permitted upon a street without liability for consequen-

tial damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more

conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the Elevated Railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91*c*, and it is there said, "established beyond question the existence of these rights, or easements of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the judgment of the Court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the judgment of the Court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding

of the Court of first instance, and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries* v. *New York & Harlem R.R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is that on this state of facts, as was held in the similar case of *Fries* v. *New York & Harlem R.R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the Elevated Railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story* v. *New York Elevated R.R.*, 90 N.Y. 122, 160, 170, 178. *Lahr* v. *Metropolitan Elevated Ry.*, 104 N.Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that notwithstanding the facts specifically found the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the Courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York Courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantage of the expecta-

tion that a street would remain open and a right *in rem* that it should remain so. See *Stanwood* v. *Malden*, 157 Mass. 17. Again, more narrowly, if the New York Courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. *Keats* v. *Hugo*, 115 Mass. 204, 216. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barrett* v. *Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson* v. *Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same Courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the Elevated Railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this Court a good while to explain. The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts,

Burgess v. *Seligman*, 107 U. S. 20, 34; *Stanly County* v. *Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the Courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the Elevated Railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co.* v. *Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the State Courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the Elevated Railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But, again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now

is open to travel, and that an impassable barrier along its width has been removed; in other words that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton* v. *Wheeler*, 179 U. S. 141. *Gibson* v. *United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this Court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional

limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the Courts, I cannot believe that whenever the Fourteenth Amendment or Article 1, Section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local Courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local Courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this Court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation.

Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton* v. *Wheeler*, 179 U. S. 141. *Meyer* v. *Richmond*, 172 U. S. 82. See *Mugler* v. *Kansas*, 123 U. S. 623, 668. *Merchant* v. *Pennsylvania R. R.*, 153 U. S., 380. *Canfield* v. *United States*, 167 U. S. 518, 523. *People* v. *D'Oench*, 111 N. Y. 359, 361. *Sawyer* v. *Davis*, 136 Mass. 239. *Commonwealth* v. *Alger*, 7 Cush. 53. Compare *United States* v. *Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice WHITE and Mr. Justice PECKHAM concur in the foregoing dissent.

True copy.

Test:

Clerk Supreme Court, U. S.